NOT DESIGNATED FOR PUBLICATION

ARKANSAS COURT OF APPEALS

DIVISION II
No. CAO8-1088

MARY IRENE MURRY APPELLANT V. DAVID FURGASON ESTATE OF RAYMOND A. MURRY, JR. APPELLEES	**Opinion Delivered** April 22, 2009 APPEAL FROM THE SALINE COUNTY CIRCUIT COURT, [NO. PR-2007-299-1] HONORABLE ROBERT W. GARRETT, JUDGE REVERSED AND REMANDED

JOSEPHINE LINKER HART, Judge

Mary Irene Murry (Mary), the mother of decedent Raymond A. Murry, Jr., (Raymond) appeals from an order of the Saline County Circuit Court denying her petition to invalidate the purported Will of her son, which gave the bulk of his estate to his "life partner" David Furgason. On appeal, she argues 1) the trial court's ruling is clearly erroneous because the attesting witnesses were not in the presence of the testator when they signed the Will; 2) Furgason failed to establish beyond a reasonable doubt that the other statutory requirements for execution of the Will were met; and 3) the trial court clearly erred in finding that Furgason overcame the presumption of undue influence beyond a reasonable doubt. We reverse and remand.

Raymond died on April 22, 2007, of acute renal failure after a month-long illness. While he was in the intensive care unit of Baptist Hospital, a document dated April 12, 2007, that was purported to be his Will was executed. It is undisputed that the document was a pre-printed will form that had been purchased by Furgason at a business-supply store and that Raymond's sister, Brenda J. Lewellen,

had filled in all blanks except for those designated for the signatures of the testator and witnesses. It is also undisputed that the purported Will bore the signatures of Lewellen, Lewellen's daughter Melissa Stewart, and Mary L. Navarro, who was another sister of Raymond, as witnesses. Charlotte M. Gilliam, also Raymond's sister, notarized the document. On July 3, 2007, Stewart and Lewellen signed Proof of Will affidavits. On July 7, 2007, Furgason petitioned to have Raymond's Will admitted to probate. Mary contested the Will, challenging the validity of its execution.

At the hearing on Mary's petition, Lewellen, Navarro, and Stewart confirmed that they signed the purported Will as witnesses, but disavowed the veracity statement:

> The Testator and the Witnesses, respectively, whose names are signed to the attached and foregoing instrument, were sworn and declared to be the undersigned that the Testator signed the instrument as his or her Last Will and Testament and that each of the Witnesses, in the presence of the Testator and each other, signed the will as a witness.

The notary, Gilliam, testified that she did not witness Raymond sign the Will. Lewellen, Navarro, Stewart, and Gilliam stated that when they first saw the purported Will at Lewellen's house in Bryant, it was blank except for Raymond's signature. At that time, Lewellen, at Furgason's behest, filled in the blanks. They signed as witnesses at that time. Meanwhile, Raymond was confined to intensive care at Baptist Hospital in Little Rock. Lewellen did, however, admit that, at Raymond's behest, she struck out a provision splitting his AT&T pension account 50/50 between Furgason and Mary, and made the bequest 75/25. Likewise, Gilliam, Stewart and Lewellen repudiated their Proof of Will affidavits.

Furgason denied that Raymond had signed the Will form when it was blank, but confirmed that it was filled out at Lewellen's home. He stated that Lewellen, Navarro, and Gilliam were present

when he negotiated with them over how much Mary would receive from Raymond's estate.[1] Furgason, however, denied that Raymond or the witnesses signed the document until they met at the hospital the next day. He claimed that he was in a waiting room in a separate building when Lewellen took the will to Raymond, along with Stewart and Stewart's husband Ernie. He corroborated Lewellen's testimony that she altered the percentage of the bequest of the AT&T pension account. According to Furgason, Lewellen took the Will back to Raymond and returned with his signature and initials. He then accompanied Lewellen, Navarro, and Stewart to the hospital cafeteria where they signed as witnesses. Furgason specifically stated that Stewart signed the document without being asked to do so by anyone. Significantly, Furgason candidly admitted that he had "enough control" that he could tell Raymond what to do and Raymond would have done it.

The trial court denied Mary's petition. In a letter opinion, the trial judge opined that the case "revolved solely on the credibility of the witnesses." In written findings of fact, the trial judge found that Furgason had overcome the rebuttable presumption of undue influence and that the Will was properly executed in accordance with Arkansas Code Annotated section 28-25-103 (Repl. 2004). He also found that Furgason's "factual recollection appears more credible."

We review probate matters de novo but will not reverse probate findings of fact unless they are clearly erroneous. *Fischer v. Kinzalow*, 88 Ark. App. 307, 198 S.W.3d 555 (2004). A finding is clearly erroneous when, although there is evidence to support it, we are left on the entire evidence with the firm conviction that a mistake has been committed. *Id.* We also defer to the superior position of the lower court sitting in a probate matter to weigh the credibility of the witnesses. *Id.* Although Mary

[1] Furgason testified, "I then asked them what they wanted. And they said, what do you mean? And I said, what do you want—what do you want from Raymond with regards to his pension?"

makes three separate arguments, the first two are so inextricably connected that we believe it would be expeditious to address them together.

Mary argues that the trial court erred in admitting Raymond's Will to probate because the statutory formalities required by Arkansas Code Annotated section 28-25-103 were not followed. She contends that the attesting witnesses did not sign at Raymond's request, in his presence. Additionally, there was no evidence that Raymond signed the Will in the presence of two disinterested witnesses or that Raymond declared the instrument to be his Will. Mary also challenges the validity of Raymond's "signature." We agree that the statutory formalities were not followed in this case.

The Arkansas Probate Code requires for valid execution of a Will the following formalities:

> (a) The execution of a will, other than holographic, must be by the signature of the testator and of at least two (2) witnesses.
> (b)(1) The testator shall declare to the attesting witnesses that the instrument is his or her will and either:
> (A) Himself or herself sign;
> (B) Acknowledge his or her signature already made;
> (C) Sign by mark, his or her name being written near it and witnessed by a person who writes his or her own name as witness to the signature; or
> (D)(i) At his or her discretion and in his or her presence have someone else sign his or her name for him or her.
> (ii) The person so signing shall write his or her own name and state that he or she signed the testator's name at the request of the testator.
> (2) In any of the cases listed in subdivision (b)(1) of this section:
> (A) The signature must be at the end of the instrument;
> (B) The act must be done in the presence of two (2) or more attesting witnesses.
> (c) The attesting witnesses must sign at the request and in the presence of the testator.

Ark. Code Ann. § 28-25-103.

While we acknowledge that it is our practice to defer to the trial court on issues of witness credibility, contrary to the trial court's finding, this case does not "revolve" around the credibility of the witnesses. Despite the trial court's finding that Furgason's testimony was credible, we note that

there is no significant variation between Furgason's account of how the execution of the purported Will was witnessed and the testimony of Lewellen, Navarro, and Stewart relating to that issue. By all accounts the attesting witnesses did not sign in the presence of the testator. While we are mindful that the "in the presence of the testator" requirement of section 28-25-103 has been interpreted to mean "within the range of any testator's senses," *Connor v. Donahoo*, 85 Ark. App. 43, 46, 145 S.W.3d 395, 397 (2004), the hospital cafeteria was well beyond the range of Raymond's senses. Moreover, to the extent that there was any proof on this point, it is clear that it was Furgason, not Raymond, that asked Lewellen and Navarro to attest the purported Will, and Furgason stated that Stewart signed as a witness on her own volition. Further, according to Furgason's testimony, the Will was only signed in the presence of a single witness: Lewellen. Because the formalities required by section 28-25-103 were not followed, we hold that the trial court clearly erred in finding that the purported Will was valid. We therefore reverse and remand for further proceedings consistent with this opinion. Because we hold that the purported Will is invalid, we need not consider Mary's other point regarding undue influence.

Reversed and remanded.

VAUGHT, C.J., and BROWN, J., agree.